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12 AMAZON WEB SERVICES, INC., and
13 TWITCH INTERACTIVE, INC.

14 UNITED STATES DISTRICT COURT
15
16 NORTHERN DISTRICT OF CALIFORNIA
17
18 SAN JOSE DIVISION

17 IN RE: PERSONAL WEB TECHNOLOGIES,
18 LLC ET AL., PATENT LITIGATION

18 AMAZON.COM, INC., and AMAZON WEB
19 SERVICES, INC.,

20 Plaintiffs

21 v.

21 PERSONALWEB TECHNOLOGIES, LLC and
22 LEVEL 3 COMMUNICATIONS, LLC,

22 Defendants,

23 PERSONALWEB TECHNOLOGIES, LLC, and
24 LEVEL 3 COMMUNICATIONS, LLC,

25 Plaintiffs,

26 v.

26 TWITCH INTERACTIVE, INC.,

27 Defendant.

Case No.: 5:18-md-02834-BLF

Case No.: 5:18-cv-00767-BLF

Case No.: 5:18-cv-05619-BLF

**SECOND NOTICE OF AMAZON.COM,
INC., AMAZON WEB SERVICES, INC.,
AND TWITCH INTERACTIVE, INC.
RE MOTION FOR ATTORNEY
FEES AND COSTS**

Dept: Courtroom 3, 5th Floor
Judge: Hon. Beth L. Freeman

1 At the August 6, 2020 hearing on the motion for attorney fees and costs, the Court asked
2 whether Amazon sought an exceptional case finding against both PersonalWeb Technologies LLC
3 and Level 3 Communications LLC. Dkt. 628 (8/6/20 Tx. at 21:11-20).

4 While it appeared as a co-Plaintiff with PersonalWeb, Level 3 took the position throughout
5 the case that it had in fact asserted no claims. Dkt. 175, ¶ 3 (“All infringement allegations, state-
6 ments describing PersonalWeb, statements describing any Defendant (or any Defendant’s products)
7 and any statements made regarding jurisdiction and venue are made by PersonalWeb alone, and
8 not by Level 3.”). After retaining separate outside counsel (*see* Dkts. 366, 383-85, & 426), Level
9 3 made only two substantive filings in the case. In the first, it refused the Court’s request to provide
10 a position as to whether Amazon’s CloudFront product fell within Level 3’s exclusive field of use
11 under the Kinetech-Digital Island Agreement. *See* Dkt. 429 at 1:16-26. In the second, it gave
12 notice that PersonalWeb had commenced a related arbitration against it. Dkt. 465.

13 Amazon and Twitch did not specify in their notice of motion against which parties they
14 sought a fee award (Dkt. 593 at 1), but the motion did not identify the above conduct as part of the
15 reason the Court should find the case exceptional, and the proposed order was directed to Person-
16 alWeb. Dkt. 592-18 (“PersonalWeb is ordered to pay \$ _____ in attorney fees and
17 expenses incurred by Amazon and Twitch in defending PersonalWeb’s claims in this multidistrict
18 litigation and in the individual cases that comprise it.”). The majority rule under Rule 54 provides
19 that the district court has discretion to apportion liability for fees as it sees fit. *See, e.g., Ortho-*
20 *McNeil Pharm., Inc. v. Mylan Labs. Inc.*, 569 F.3d 1353, 1357 & n.4 (Fed. Cir. 2009) (noting “the
21 default rule is that the losing parties are jointly and severally liable for costs,” but that “the district
22 court has discretion to apportion payment of jointly incurred costs among the losing parties”);
23 *Anderson v. Griffin*, 397 F.3d 515, 522-23 (7th Cir. 2005) (“The cases say that the presumptive rule
24 [for how to divide costs between the parties] is joint and several liability unless it is clear that one
25 or more of the losing parties is responsible for a disproportionate share of the costs”). But given
26 the limited role of Level 3 in this case, Amazon and Twitch wish to clarify their response at the
27 hearing and confirm that, while “exceptional case” is determined from the totality of the circum-
28 stances, their motion seeks a fee award as against PersonalWeb Technologies and not Level 3.

1 Dated: August 14, 2020

Respectfully submitted,

2 FENWICK & WEST LLP

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4 By: /s/ J. David Hadden

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5 Counsel for AMAZON.COM, INC., AMAZON
6 WEB SERVICES, INC., and TWITCH INTER-
7 ACTIVE, INC.
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ATTORNEYS AT LAW